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The Separation of Powers: *Hamdan v. Rumsfeld* – The Anti- Roberts

Douglas W. Kmiec*

In the war on terror, the President does not have a blank check.
The question is: was he short-changed?

The Supreme Court, in a five-to-three decision, resolved *Hamdan v. Rumsfeld*¹ against the President of the United States and his effort to create a military tribunal system for purposes of trying those who are being detained in Guantanamo Bay, Cuba. *Hamdan*, in my judgment, is the anti-Roberts. It is the antithesis of judicial humility over a subject matter that by Constitutional plan has been given to the President and Congress. Roberts, of course, can't be blamed. He was recused.² It might be supposed that his vote, being only one, would not have changed the outcome. This may formally be true, but it understates the moderating influence his voice may well have had on an opinion that is deeply at odds with the history of the Court in wartime and both the law of the Constitution and statute.

Concurring, Justice Breyer wrote that the 178-page opinion might be summarized as: The President doesn't have a blank check.³ This phrase has become the popular summary of this long and complex decision, and understandably, it is most often employed by the President's political opponents. I am not one of them, even as I have openly questioned the intelligence relied upon to justify America's entry into Iraq and believe the President now needs to re-think our continued occupation in light of the unconventional nature of the enemy.

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1. 126 S. Ct. 2749 (2006).

2. *Id.* at 2799.

3. *See id.* at 2799 (Breyer, J., concurring) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)) ("Congress has not issued the Executive a 'blank check.'").

Those who employ the “blank check” phrase have a tendency to use it as a bill of indictment to the effect that President Bush is callously disregarding due process, privacy, and the statutory limits of the law.⁴ As evidence in support of the political indictment, there is typically criticism of presidential decisions to pursue a system of military tribunals, skepticism over the detention of enemy combatants, allegations of lawlessness in the gathering of military intelligence to prevent attack when that intelligence activity is undertaken without Article III or the Foreign Intelligence Surveillance Act (FISA)⁵ warrant, reminders of the shameful abuse at Abu Ghraib to bemoan the use of aggressive interrogation techniques, and even concern over the tendency of President Bush to raise separation of powers and other constitutional qualifications in signing statements.

It is beyond the scope of this presentation to address each aspect of the political indictment, but suffice it to say the President is not without significant rebuttal, some of which will be presented following an examination of the reasoning in *Hamdan*. It is important at the beginning, however, simply to suggest that, with respect, Justice Breyer is deeply mistaken to think the “blank check” remark is sufficient to evaluate either the President’s power or the need for the energetic use of that power to defend the United States from radical Islam. So, let’s do some initial ground-clearing.

As a matter of policy, I submit there is common ground: that we face a ruthless enemy that targets civilian populations, and hides behind and among them; that this enemy has declared war and made war on the United States; that, as in any war, captured enemy fighters need to be detained for some period to prevent their return to the battle and for purposes of interrogation to prevent attack; that there is reasonable evidence of an intelligence failure pre-9/11 partially attributable to the unclarity of FISA procedures and a mistaken wall of separation between law enforcement and foreign surveillance; that the Constitution is indeed the supreme law of the land, but it also not a suicide pact; that efforts to fight terrorism by routine criminal prosecution is inconsistent with past wartime practice and based on the few trials that have been conducted, like that of Moussaoui, neither accommodating of needed interrogation nor observant of the defendant’s rights; that those who are being detained at Guantanamo Bay, Cuba should be fairly and responsibly handled in a way that is accountable to our traditions, as well as to the traditions observed by all free people; and that the President’s signing statements are, in the main, more hypothetical than

4. See 109 Cong. Rec. S10383 (daily ed. Sept. 28, 2006) (statement of Sen. Clinton).

5. 50 U.S.C. §§ 1801-63 (2003).

constitutionally subversive. In short, as a matter of policy and wartime reality, the bill of indictment against the President fails.

What about the law? As earlier noted, Justice Stevens' majority opinion in *Hamdan* striking down the military tribunal system is remarkable for its lack of humility. First, it vastly understates the founding role assigned to the President. In THE FEDERALIST NO. 70, Hamilton assumed "that all men of sense will agree in the necessity of an energetic executive."⁶ He noted in particular that an energetic President is "essential to the protection of the community against foreign attacks."⁷ Hamilton thus anticipated that "[d]ecision, activity, secrecy, and dispatch [would] generally [and appropriately] characterise the proceedings of one man in a much more eminent degree than the proceedings of any greater number," including a judicial committee of five.⁸

Secondly, the *Hamdan* opinion shows little recognition of the President's unique role and capacities in foreign affairs—a role previously expounded by the Court in *Curtiss-Wright*.⁹ There Justice Sutherland opined on the fundamental difference between foreign and domestic matters. "The two classes of powers are different," Sutherland wrote for the Court:

both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.¹⁰

Moreover, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹¹ Sutherland quotes John Marshall in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹²

6. THE FEDERALIST NO. 70 (Alexander Hamilton).

7. *Id.*

8. *Id.*

9. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

10. *Id.* at 315-16.

11. *Id.* at 319.

12. *Id.*

Third, *Hamdan* ignores what Justice Sutherland assumed was well established, namely, that:

within the international field, [the President] must often [be] accord[ed] . . . a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress [or the Court], has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.¹³

Fourth, even if the *Hamdan* Court was not prepared to give the President discretion in wartime foreign affairs, one might have supposed some recognition of the ambiguities that inhere in constitutional assignments in wartime. As Justice Jackson candidly remarked in his *Youngstown* concurrence:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.¹⁴

Fifth, in recognition of the above, Justice Frankfurter cautioned the Court “to be wary and humble. Such is the teaching of this Court’s role in the history of the country.”¹⁵ Indeed, Justice Stevens shows no recognition of the Court’s historical circumspection in war matters. As Justice Brennan once remarked, the Court has never fully developed a jurisprudence of

13. *Id.* at 320.

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

15. *Id.* at 597 (Frankfurter, J., concurring).

national security. It is simply too episodic,¹⁶ he said. The late Chief Justice Rehnquist agreed even as his own research showed greater willingness for the Court to superintend—after the fact—the actions of the executive in times of war or similar crisis.¹⁷

Sixth, even if Justice Stevens did not wish to be guided by founding precept, constitutional assignment, precedent, or historical practice, *Hamdan* might have been somewhat sensitive to the unique features of the war on terror, which is neither a hot, nor cold, war in a traditional sense. Terrorism has the potential to be not only hot, but blistering, and something which will likely never be fully appreciated as having gone truly cold. With that qualification, when the past decisions of the Court in times of hot or cold war are examined for the information or guidance they do yield, what we will see succinctly is that the judiciary has by conscious institutional choice played little role during hot war and reserved its relatively rare attempts at constitutional boundary-keeping to post-war analysis. In cold war periods, there has been greater, but still infrequent, judicial involvement. In these colder periods, an unvarnished claim of military emergency has not been permitted to dispose of free speech claims made by citizens. Yet, prior to *Hamdan*, no Court had ever second-guessed the military judgment of the President on behalf of enemy combatants.

Seventh, apart from the question of presidential authority, there was a reasonable basis to conclude that Congress had withdrawn jurisdiction in *Hamdan* in reaction to Justice Steven's five-to-four opinion in the previous term in *Rasul v. Bush*.¹⁸ *Rasul* found a statutory habeas right running in favor of the Guantanamo detainees.¹⁹ There was contrary precedent—a World War II decision in *Johnson v. Eisentrager*²⁰ that said rather plainly that nothing in the text of the Constitution or in the statutes of the United States confers a habeas right on aliens outside the territory of the United States.²¹ Justice Stevens reasoned that subsequent cases triggered a statutory right.

16. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Address at the law school of the Hebrew University, Jerusalem, Israel (Dec. 22, 1987).

17. *Id.*

18. 542 U.S. 466 (2004).

19. *Id.* at 483-84.

20. 339 U.S. 763 (1950).

21. *Id.* at 768.

In response, Congress passed the Detainee Treatment Act of 2005 (DTA), providing with limited exception that “no court, justice, or judge, shall have jurisdiction to hear or consider” the habeas application of a Guantanamo Bay detainee.²² The Court took that language in *Hamdan* and changed it to “every court, justice or judge” shall have habeas jurisdiction if the habeas pleading was pending on December 30.²³ Justice Scalia labeled the judicial revision “patently erroneous.”²⁴

In fairness, it was an arguable point. Justice Stevens noted that in two sections, not at issue in *Hamdan*, Congress expressly provided for retroactive application.²⁵ In Stevens’ mind, this gave rise to the negative inference that Hamdan’s jurisdiction had not been withdrawn, as it was pending prior to the DTA’s effective date. Of course, the argument on the other side is a presumption going back some centuries that laws repealing jurisdiction without any reservation as to pending cases applies to all cases pending and future. Ironically, the best expression of this principle was articulated in the *Landgraf*²⁶ case in 1994 by none other than Justice Stevens.²⁷

HAMDAN – THE COURT AS COMMANDER?

Without the judicial humility embodied in the above considerations, the Court in *Hamdan v. Rumsfeld* proceeded to find the President not to have been given statutory authority for military commissions by the Authorization for the Use of Military Force (AUMF) or the Uniform Code of Military Justice (UCMJ).²⁸ The Court curiously chooses not to address the President’s constitutional authority as Commander in Chief in wartime. Justice Stevens writes stiffly: “Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions ‘without the sanction of Congress’ in cases of ‘controlling necessity’ is a question this Court has not answered definitively, and need not answer today.”²⁹

The Court goes on to say that military commissions must be authorized either by statute or the law of war, and finds neither.³⁰ The President points

22. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2742 (2005).

23. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2810 (Scalia, J., dissenting).

24. *Id.*

25. *Id.* at 2764.

26. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

27. *Id.* at 293.

28. *Hamdan*, 126 S. Ct. at 2749.

29. *Id.* at 2774.

30. *Id.* at 2830 (Thomas, J., dissenting).

to the broadly worded AUMF, which the Court found (per Justice O'Connor just the year previous) authorized detention in *Hamdi* even overriding a specific statute, the Non-Detention Act.³¹ Moreover, the President pointed to the fact that the Congress also provided an appellate review procedure for the President's military commissions in the Detainee Treatment Act of 2005 (DTA).³² That was merely reference, not affirmation, said Justice Stevens.³³

The Court admits that Article 21 of the UCMJ permits a military commission, but then grafts upon it a "jurisdictional pre-condition" of "military necessity."³⁴ This is something the Court imports not from the statute, but from a legal treatise. Privileging a legal treatise over the text of a statute is, well, unusual. The Court then concludes that this "necessity" is absent because Hamdan's alleged criminal activity occurred off the battlefield and before 9/11.³⁵ But might not even preparation at one remove have advanced the planning of the attack? As Justice Thomas noted in the dissent:

The text of the AUMF is backward looking, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Thus, the President's decision to try Hamdan by military commission—a use of force authorized by the AUMF—for Hamdan's involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspirators to justice is the *primary point* of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his alternative involvement in the events of September 11, 2001.³⁶

Having found the commission to be unauthorized, it is not clear why the Court then goes on in Part VI to find that the commissions created by the President also failed to meet UCMJ standards, but dicta or not, the Court

31. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

32. *Hamdan*, 126 S. Ct. at 2763.

33. *Id.* at 2775.

34. *Id.* at 2820.

35. *Id.* at 2777-78.

36. *Id.* at 2827 (Thomas, J., dissenting).

finds that under Article 36 of the UCMJ, no procedural rule for military commissions may be “contrary to or inconsistent with” the UCMJ, and further, the rules adopted must be “uniform insofar as practicable.”³⁷ “That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.”³⁸ The Court here almost gives the President a small increment of deference implying that deviation from UCMJ standards would be permitted with a proper presidential finding of impracticability.³⁹ But the generosity here amounts to little since ultimately the Court suggests that such finding is itself not possible because—in the Court’s judgment—there is no “exigency” to depart from the UCMJ rules.⁴⁰

From the President’s perspective, of course, there is some exigency in the difficulty of prosecuting terror cases, itself. UCMJ rules equal or exceed those in regular civilian courts, and acquiring evidence in wartime is different from a preserved crime scene.⁴¹ Evidence in a war setting is gathered in circumstances that do not employ search warrants or *Miranda* warnings, and therefore, would often be inadmissible in either a courts-martial or Article III court. Nonetheless, Justice Stevens blithely writes: “Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.”⁴²

The Court also brings the war on terror within the Geneva Convention.⁴³ The Geneva Convention actually consists of four treaties.⁴⁴ Under article 49, 50, 129, and 146 of the Geneva Conventions I, II, III, and IV, respectively, all signatory states are required to enact sufficient national law to make grave violations of the Geneva Conventions a punishable criminal offense.⁴⁵ Geneva I is for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva II is for the

37. *Id.* at 2790.

38. *Id.*

39. *Id.* at 2791.

40. *Id.* at 2805 (Breyer, J., concurring).

41. *See id.* at 2790-91 (majority opinion).

42. *Id.* at 2756.

43. *Id.* at 2795.

44. *See id.* at 2756-57.

45. *See* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Oct. 21, 1950, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 50, Oct. 21, 1950, 75 U.N.T.S. 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, art. 129, Oct. 21, 1950, 75 U.N.T.S. 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 146, Oct. 21, 1950, 75 U.N.T.S. 287.

Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva III is relative to the Treatment of Prisoners of War—first adopted in 1929 and revised in 1949; and Geneva IV is relative to the Protection of Civilian Persons in Time of War, adopted in 1949 and based on the Hague Treaty of 1907. There are also three additional protocols to the Geneva Convention: Protocol I of 1977: relating to the Protection of Victims of International Armed Conflicts; Protocol II also of 1977: relating to the Protection of Victims of Non-International Armed Conflicts; and Protocol III (2005): relating to the Adoption of an Additional Distinctive Emblem.

The President reasoned that Geneva did not apply to al Qaeda since it was not a signatory nation, but an unlawful combatant fighting dishonorably out of uniform, targeting civilians, and so forth.⁴⁶ The Court says it is not necessary to say whether the President is right to view al Qaeda as an “unlawful” combatant or not because it asserts one portion of Geneva applies to everyone—Common Article 3 of Geneva III (C3).⁴⁷ Prior to this case, C3 was thought to cover internal armed conflict (*not of an international character*).⁴⁸ Relying on legal commentary, however, the Court construes these words not geographically, but simply as an alternative way of saying not “a conflict between nations.”⁴⁹ Thus, the U.S. v. al Qaeda war is included because al Qaeda is not a nation, but rather, a loosely affiliated, world-wide set of radical Islamic “cells” with the announced declaration (“fatwa”) to kill Americans in the millions wherever found.

When the Court applies C3 in this fashion, protections must be given to all manner of combatants (lawful or unlawful). While this does not eliminate the distinction between honorable soldier and dishonorable terrorist, it greatly narrows it misleadingly suggesting that both are a prisoner of war. Most fundamentally, C3 provides that a detainee no longer in active hostilities shall not be subject to “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵⁰ The Court concludes

46. *Hamdan*, 126 S. Ct. at 2761, 2782.

47. *Id.* at 2756-57.

48. See Geneva Convention (III) art. 3.

49. *Hamdan*, 126 S. Ct. at 2757.

50. Geneva Convention (III) art. 3.

that courts-martial, not military commissions, are the tribunals that are regularly constituted.⁵¹

And what then are the “judicial guarantees” to be afforded “as indispensable by civilized peoples”?⁵² Answer—for the plurality, but not Justice Kennedy—the provisions of Article 75 of Protocol I become the articulation of safeguards to which all persons in the hands of a detaining power are entitled.⁵³ Among the rights set forth in Article 75 is the “right to be tried in [one’s] presence.”⁵⁴ Military commissions did not guarantee this since the President thought it ill-advised to let the enemy in on classified information.⁵⁵ The enemies’ counsel with appropriate security clearance, of course, would be present.⁵⁶ Justice Stevens, and the plurality, found the presence of counsel to be insufficient, even granting “[t]hat the Government has a compelling interest in denying Hamdan access to certain sensitive information [A]bsent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.”⁵⁷

One would not know it by reading *Hamdan*, but Protocol I, which includes Article 75, was never ratified by the United States.⁵⁸ The United States declined ratification because Article 44 within Protocol I proposed dealing with unlawful combatants,⁵⁹ in the manner contemplated by Justice Stevens. In 1987, President Reagan explained the rejection noting that the proposed modification to Geneva (Protocol I, art. 44(3)) was “fundamentally and irreconcilably flawed [since it] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.”⁶⁰ This differentiation of lawful from unlawful combatant is not an exercise of revenge or animus, but the preservation of civilization. The

51. *Hamdan*, 126 S. Ct. at 2757.

52. *See id.* at 2848.

53. *Id.*

54. *Id.*; Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 75(4)(e), June 8, 1977, 1125 U.N.T.S. 3.

55. *See Hamdan*, 126 S. Ct. at 2797-98.

56. *Id.*

57. *Id.* at 2798.

58. *Id.* at 2797.

59. *See* Abraham D. Sofaer, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont’d)*, 82 AM. J. INT’L L. 784, 786 (1988).

60. *See generally* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L & POL’Y 419, 427-28 (1987). The rejected Protocol had been drafted by third world nations who were anxious to grant combatant status to liberationists and guerillas who challenged “racist regimes.” The drafting unfortunately overlooked the consequences to innocent civilians and civil order. President Reagan foresaw its ill-consequence.

military is asked to direct its aim at military targets and to preserve the lives of civilians and POWs. For this to be possible, lawful soldiers must be assured that civilians and prisoners are not taking aim to kill them. As one writer succinctly put the matter:

Civilians who abuse their noncombatant status are a threat not only to soldiers who abide by the rules, they endanger innocents everywhere by drastically eroding the legal and customary restraints on killing civilians. Restricting the use of arms to lawful combatants has been a way of limiting war's savagery since at least the Middle Ages.⁶¹

Notwithstanding the importance of drawing and maintaining a reasonably bright line between lawful and unlawful combatants, President George W. Bush directed that al Qaeda and the Taliban be provided with "humane treatment."⁶²

The Court was unsatisfied, pointing to Article 75, which the plurality claimed was more generous than President Bush's conception of such treatment.⁶³ The difference is not apparent, however. Assuming Article 75 of Protocol I to be a restatement of customary international law, it prohibits torture, hostage-taking, collective punishments, and respective threats to do such acts.⁶⁴ It requires detainees be informed as to the reasons of their detention and that detainees be released when the circumstances of, and reasons for, their detention no longer exist.⁶⁵ Before and after the decision in *Hamdan*, it is fair to say, the President would concede each of those protections. It was in terms of the nature of required judicial process where the President and the Court disagreed.

61. Andrew Apostolou & Frederic Smoler, *The Geneva Convention is Not a Suicide Pact* (2004) http://www.defenddemocracy.org/usr_doc/Genevaconvention_11_6_02_2.pdf.

62. See White House Memorandum, *Humane Treatment of Taliban and al Qaeda Detainees* 2 (Feb. 7, 2002), http://www.humanrightsfirst.org/us_law/etn/Gonzales/memos_dir/dir_20020207_Bush_Det.pdf.

63. See *Hamdan*, 126 S. Ct. at 2798.

64. Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(2)(b)-(e), June 8, 1977, 1125 U.N.T.S. 3.

65. *Id.* at art. 75(3).

The dissenters (Justices Scalia and Alito) themselves write, joining with Justice Thomas, that:

[I]t is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "military necessity" . . . of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.⁶⁶

The dissent undertakes to refute Justice Stevens point-by-point, but the ultimate refutation was given by Congress.

A few months following *Hamdan*, the Congress specifically authorized the military tribunals the President sought in The Military Commissions Act of 2006.⁶⁷ Each accused tried by Military Commission has the following procedural safeguards: the presumption of innocence; proof of guilt beyond a reasonable doubt; the right of self-representation; protection against the use of statements obtained by the use of torture; the right to call and cross examine witnesses; the guarantee that nothing said by an accused to his attorney, or anything derived therefrom, may be used against him at trial; no adverse inference from remaining silent; the overall requirement that any Military Commission proceeding be full and fair; a free military defense counsel and the right to hire private counsel; and the right to be present at all sessions of the military commission, other than those for deliberations and voting.⁶⁸

Evidentiary standards are as the President originally proposed, admitting evidence that would have "probative value to a reasonable person."⁶⁹ Evidence may not be excluded on the grounds that it was not seized pursuant to a search warrant.⁷⁰ This standard of evidence takes into account the unique battlefield environment that is different from traditional peacetime law enforcement practices in the United States. Verdicts are by a two-thirds vote, other than death which must be unanimous.⁷¹ Each case which includes a finding of guilt is referred to the Court of Military Commission

66. *Hamdan*, 126 S. Ct. at 2823 (Thomas, J., dissenting).

67. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

68. *See id.*

69. Military Commissions Act of 2006 § 949a(b)(2)(A).

70. *Id.* at § 949a(b)(2)(B).

71. *Id.* at § 949m(a), m(b)(1)(C).

Review.⁷² The Secretary of Defense will establish a Court of Military Commission Review composed of at least three appellate military judges. The judges may be military or civilian.⁷³ The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to determine the validity of any final decisions of a Military Commission case.⁷⁴ The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals.

The President is now confident he has the authority to proceed. Justice Stevens' view remains to be seen.

WHAT ABOUT SIGNING STATEMENTS? IS THE PRESIDENT PUTTING HIMSELF
ABOVE THE LAW THERE?

An ABA Task Force Report on Presidential Signing Statements recently proposed a set of resolutions to curtail presidential power.⁷⁵ The resolutions (and accompanying report) are responsibly and thoughtfully written, by responsible and thoughtful people. For the most part, the resolutions should be just as thoughtfully rejected.

The Task Force legitimately reaffirms that the President has no general dispensing authority. That is, enacted laws the President signs are to be enforced, not suspended—unless the newly enacted law violates the Constitution itself.⁷⁶ Even the Task Force had to concede this qualification, and when it does, the Report and the utility of its resolutions lose much of their punch, since it is within the qualification where all the difficult issues are hidden.

The general media reported the ABA Task Force missive as taking a punch at President Bush.⁷⁷ In truth, the ABA Task Force claims not to be singling out the current occupant of the White House.⁷⁸ It could not credibly do so. As the ABA Task Force notes, for example, it was the standing

72. *Id.* at § 950c(a).

73. *Id.* at § 950f(a).

74. *Id.* at § 950f(b).

75. ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Formal Op. (2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

76. *Id.* at 19-20.

77. See, e.g., Charlie Savage, *Panel Chides Bush on Bypassing Law: ABA Group Cites Limits to Power*, BOSTON GLOBE, July 24, 2006, at A1.

78. See ABA Task Force, *supra* note 75, at 4-5.

policy of the Clinton administration that “if . . . the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.”⁷⁹ This view, Dellinger observed at the time, was shared by at least four sitting Justices (Scalia, O’Connor, Kennedy and Souter).⁸⁰

Nevertheless, what the Task Force recommends would appear to overrule Dellinger and a good deal of constitutional history, doctrine, and practice. The use of presidential signing statements can be traced back at least to 1830 when President Andrew Jackson employed the device to give his interpretation of a road appropriation.⁸¹ But more importantly, the Constitution is not hortatory fluff; it is law, and in the hierarchy of laws, it is supreme. If the ABA Task Force means to elevate transient statute over constitutional requirement, it has subverted the rule of law in the name of preserving it.

Even though the ABA Task Force vastly understates the responsibility of the President to assess the constitutionality of enactments presented for his approval, the ABA Task Force does suggest some practical steps that may avoid unnecessary constitutional clash. Most constructively, the ABA Task Force recommends giving greater attention to, and fuller vetting of, constitutional difference in the legislative process.⁸² That is all for the good. There is no point in being cagey or coy in claims of authority, and were greater public light shown upon such in legislative debate, the Congress might be less likely to invade the executive, and the executive less likely to claim trespass where none has been committed.

Other recommendations have less merit. The recommendation to create congressional standing is yet another attempt to have political issues tried in the courts. It is more the mindset of trial lawyers than constitutional statesmen. The courts are not well suited to resolving political disputes, and it is highly doubtful whether the ABA Task Force’s recommendation, itself, would pass constitutional muster in terms of the requirements of a “case or controversy.”⁸³ Signing statements generally do not present a justiciable controversy. Whether it is the President or Congress that has overreached in a given circumstance, the Framers supplied ample means by which the

79. *Id.* at 13 (quoting former head of OLC for President Clinton, Walter Dellinger).

80. Memorandum from Walter Dellinger, Assistant Attorney General, on The Legal Significance of Presidential Signing Statements to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), <http://www.usdoj.gov/olc/signing.htm>.

81. ABA Task Force, *supra* note 75, at 7.

82. *Id.* at 21.

83. *Id.* at 25.

legislative and the executive can defend themselves without adding to the litigation burdens of the federal judiciary.

The ABA Task Force report should not be portrayed as an indication of a constitutional crisis. Signing statements are merely a contemporary reminder of the correctness of Madison's insight into human nature that the concentration of power is best avoided by ambition checking ambition.⁸⁴ Whether Bush or Congress, or for that matter, the previous Presidents or Congresses, had the more defensible side of individual matters requires careful legal analysis of specific factual contexts. For this reason, it will be unfortunate if the ABA Task Force report is used by legislative or anti-Bush partisans to propagate the false view that presidential signing statements represent an executive power grab or constitutional novelty. Presidential signing statements ought not to be demonized. Most of these statements are largely administrative—improving presidential supervision of the executive branch, itself. Better to have a highly visible President interpret an ambiguous statutory phrase than a near-invisible bureaucrat.

This same interest in accountability carries over to those occasions where the President is at odds with Congress. Total opposition necessitates a veto, of course, but a President should otherwise exercise his veto with care. Outright disapproval is in tension with the well accepted precept of construing statutes to avoid constitutional defect. A too ready veto also sacrifices considerable legislative effort, and frequently ends, rather than furthers, debate. It can be more deferential to legislative power to allow a new law generally to go into effect, while openly highlighting provisions that are believed to be constitutionally problematic. Of course, there is no harm in the ABA Task Force's recommendation that the President send his signing statements over to Congress, though, in truth, they are already quite easy to find online.

No President is above the law. Of course, no Congress is either—a point the Founders made when they rejected legislative supremacy in favor of a written Constitution. The presidential signing of laws cannot be the occasion for re-writing them, but it is inescapably and wisely an occasion for re-canvassing constitutional meaning—especially in the area of foreign affairs where such meaning is often decidedly and deliberately opaque. If President Bush's statements can be faulted, it is that on occasion some of his stated reservations are too cryptic to be understood. They are too much preview and not enough movie. Merely reciting that a statute is subject to

84. See THE FEDERALIST NO. 10 (James Madison).

the Constitution or powers reserved to the President speaks at too high a level of generality to be effective; it is more likely simply to be provocative.

Nevertheless, signing statements are important because they do keep faith with Madison's prescription for counteracting untoward ambition.⁸⁵ Consider for a moment something the ABA Task Force apparently missed: Congress' continued practice of lumping together numerous unrelated provisions in omnibus bills, often inserting the most controversial provisions in emergency appropriations measures passed at, or after, fiscal deadlines. There are all too many examples of this practice, but let's reference just one: the circumstances surrounding Franklin Roosevelt's approval of the Lend-Lease Act, which provided vital support to our allies in World War II.⁸⁶

As presented to FDR, the Act contained a provision for the termination of the President's authority upon the passage of a "concurrent resolution of the two Houses . . ."⁸⁷ Roosevelt correctly thought this an unconstitutional infringement of the presidential office because it provided for repeal without following the required procedure set out in the Constitution, which includes presentment to the President.⁸⁸ Interestingly, then Attorney General Robert Jackson, later a Justice of the Supreme Court, was more equivocal, speculating that the statutory limitation on the President's authority might be viewed not as a repeal but "a reservation or limitation by which the granted power would expire or terminate."⁸⁹ Roosevelt would have none of it, and in a rare twist, issued a legal opinion to his Attorney General stating that he "felt constrained to sign the measure [to meet a momentous emergency of great magnitude in world affairs], in spite of the fact that it contained a provision which, in [his] opinion, is clearly unconstitutional."⁹⁰ Roosevelt directed the Attorney General to put his legal opinion in the "official files of the Department of Justice" in order to preclude his approval of the Act from being used "as a precedent for any future legislation comprising provisions of a similar nature."⁹¹ Roosevelt was right about the unconstitutionality of this type of provision, as was confirmed later by the Supreme Court in *INS v. Chadha*⁹² in 1983, and he also correctly anticipated that Congress would

85. See THE FEDERALIST NOS. 10, 51 (James Madison).

86. See Act to Promote the Defense of the United States ("Lend-Lease Act"), 55 Stat. 31 (1941).

87. *Id.* at § 3(c).

88. See U.S. CONST. art. I, § 7, cl. 2.

89. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1355 (1953).

90. *Id.* at 1357.

91. *Id.* at 1358.

92. 462 U.S. 919 (1983) (holding that an act authorizing one house of Congress, by resolution, to invalidate a decision of the Executive Branch is unconstitutional because an action by the House pursuant to that section is essentially legislative and thus subject to constitutional requirements of passage by a majority of both Houses and presentation to the President).

continue its efforts to circumvent the presidential judgment and veto in similar ways. Does Congress *always* act in this devious manner? Of course not. It is no more fair to tar the Congress in such fashion than it is to accuse President Bush of conspiring to place himself “above the law.”

So putting overstatement aside, should the President and the Attorney General enforce statutes that they believe are unconstitutional? The logical and better answer is “no,” but the practical mind remembers that Andrew Johnson didn’t think so either, and this thinking nearly got him removed from office. Congress had passed the Tenure-of-Office Act over Johnson’s veto.⁹³ The Act precluded Johnson from freely removing members of his cabinet.⁹⁴ Notwithstanding the law’s passage, Johnson removed Secretary of War Stanton, and this became one of the articles of impeachment. In Johnson’s defense, his counsel stated:

If the law be upon its very face in flat contradiction of the plain expressed provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if the law should declare that he should not be Commander in Chief, or if the law should declare that he should take no part in making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is entrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibility of his position if he should execute it.⁹⁵

Johnson’s counsel had the winning argument. Chief Justice Salmon P. Chase, casting the deciding vote against Johnson’s impeachment, declared that the President has no duty to execute a statute that “directly attacks and impairs the executive power confided to him by [the Constitution].”⁹⁶

Are the objections being raised by President Bush uniformly of this quality? The sheer number of Bush statements does suggest some

93. An Act Regulating the Tenure of Certain Civil Offices, 14 Stat. 430 (1867).

94. *Id.*

95. 2 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 200 (1868).

96. ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 685 (1874).

unwarranted exuberance for one's own position.⁹⁷ As the late William French Smith opined, it is best to confine the presidential prerogative to those "historical examples" where Congress "attempt[s] to alter the distribution of constitutional power by arrogating to itself a power which the Executive believes the Constitution does not confer on Congress but, instead, reposes in him."⁹⁸ Such encroachments on the executive are especially apt for signing statement qualification.

In the end, for all its sound and fury, the ABA Task Force cannot escape some rather basic postulates. John Marshall was correct that "an act of the legislature, repugnant to the Constitution, is void."⁹⁹ And the President has the express responsibility to "take care that the Laws [including the Constitution as the supreme law] be faithfully executed."¹⁰⁰ Requiring Presidents to enforce—as the ABA Task Force proposes—an invalid law would be contrary to constitutional duty and oath. This is a proposition as old as the Republic. James Wilson, a principal drafter and advocate of the Constitution, wrote that "the President of the United States could shield himself and refuse to carry into effect an act that *violates* the Constitution."¹⁰¹ But then, Wilson wasn't on the ABA Task Force.

CONCLUDING THOUGHTS

Hamdan, for all the reasons stated, was an extraordinary break from precedent. The most vocal opponents of the President admit as much. Writing in the New York Review of Books, Georgetown Law Professor David Cole writes: "To say that *Hamdan* faced an uphill battle is a gross understatement."¹⁰² In light of past precedent, in light of the enemy alien status of the defendant, in light of the timing of the lawsuit before the fairness of the military proceedings themselves could even be assessed, in light of the fact that there was a congressional law that seemed to deprive the Court of jurisdiction, it's a surprise *Hamdan* won.¹⁰³ "The fact that the Court decided the case at all in the face of Congress's efforts to strip the

97. See ABA Task Force, *supra* note 75, at 2.

98. Letter from William French Smith to Peter Rodino 5 (Feb. 22, 1985) (on file with author).

99. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

100. ABA Task Force, *supra* note 75.

101. Statement of James Wilson during the Adoption of the Federal Constitution (Dec. 1, 1787), reprinted in JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787* 446 (2d ed. 1891).

102. David Cole, *Why the Court Said No*, 53 N.Y. REV. OF BOOKS 13, Aug. 10, 2006, <http://www.nybooks.com/articles/19212>.

103. See *id.*

Court of jurisdiction is remarkable.”¹⁰⁴ Listen to those words, uphill battle, setting aside past precedent, remarkable disregard of jurisdictional limits, break from historic deference. President asking for a blank check? It is more a case of the judiciary being involved in executive identity theft.

Before taking questions, one brief word on why the President has pursued military commissions. First and foremost: because al Qaeda are unlawful combatants who by every standard of international rule and practice do not fight as honorable soldiers but as terrorists out of uniform who take aim at civilian populations and endanger them and our own military men and women, who are then put in this tremendously awkward circumstance of having to fight a war in the context of residences, schools, and hospitals.

Second, the President is also concerned about the integrity of the criminal justice system. Yes, it is true, if we wanted to fight the war by criminal prosecution, we could have attempted it. We did attempt it several times. There was a World Trade Center trial that lasted a good number of years in New York in the 1990s that disclosed, among other things in the public record, that if a commercial airliner hit the World Trade Center, it would destroy it. There are grave risks proceeding by the normal criminal process intended for the prosecution of criminals within a civil order and terrorists seeking to destroy civil order altogether.

Third, we also know that the system has a tendency to get distorted in terrorism trials. Zacharias Moussaoui is indeed serving a lifetime sentence.¹⁰⁵ He did have a criminal process, but it's not one recognizable to the Sixth Amendment. His ability to confront witnesses and to compel evidence for his defense was, in fact, denied as a matter of national security in terms of his access to Ramzi Binalshibh and Khalid Shaikh Mohammed and the others who would have had information about his involvement.¹⁰⁶

The President and I differ on Iraq. I suspect Justice Stevens may share like reservations. But neither of us are the President with the authority of the Commander in Chief in wartime. Justice Stevens held it was unnecessary to address the scope of that authority in an opinion that then proceeded to undermine it.¹⁰⁷

104. *Id.*

105. See Mark Memmott, *Opinions on Moussaoui Verdict: Everybody's Got One*, USA TODAY, May 4, 2006, available at http://blogs.usatoday.com/ondeadline/2006/05/opinions_on_mou.html.

106. See *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004).

107. See generally *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Although ruling that the military commission at issue was invalid, the Court declined to determine the specific scope of

Justice Jackson, who voted in a far less consequential case (*Youngstown*) to limit presidential power, once quipped that the Justices “are not final because [they] are infallible We are infallible,” said Justice Jackson, “only because we are final.”¹⁰⁸ John Roberts told us that no one ever goes to a ball game to watch the umpire. In truth, the result in *Hamdan* in the Chief’s absence proves that sometimes it’s important to go to the game to keep your eye on the umpire.

QUESTIONS BY DAVID G. SAVAGE

PROFESSOR KMIEC: Fire when ready.

DAVID G. SAVAGE: I’m not sure I understand the big problem here. In November of 2001, two months after the 9/11 attack, President Bush put out the executive order saying we need a new system to try terrorists.¹⁰⁹ These people are not citizens. They are accused terrorists. I don’t know anybody around the country then or even now who disagrees with that, but I don’t understand what the Supreme Court ended up disagreeing with—why didn’t he ask Congress? If you’re going to create a new system for trials, why not get legislation, and why didn’t the Bush administration ask Congress to pass some bill that would essentially authorize the military tribunal?

PROFESSOR KMIEC: You know, in 2006 David, that looks eminently rational. But I also think he was being advised that he had sufficient authority already. First, an examination of Title 10, the Uniform Code of Military Justice, demonstrates that the Uniform Code of Military Justice itself, as an existing body of statutory law, does not preclude the creation of military commissions, and, in fact, specifically authorizes military commissions different from courts-martial with the admonition that the crimes that will be tried before military commissions will be those recognized by the laws of war, and with the further admonition that the military commission, wherever practicable, should follow the rules of procedure that apply to courts-martial.¹¹⁰

I think that on that statute alone the President could have been responsibly advised that he had authority to establish military tribunals,

Executive authority to convene such commissions without the sanction of Congress during times of “controlling necessity.” *See id.* at 2774.

108. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

109. *See* Remarks Following a Cabinet Meeting and an Exchange With Reporters, (Nov. 19, 2001) in 2001 BOOK II PUB. PAPERS 1423, 1425.

110. *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

separate and apart from whatever inherent authority is his under Article II. There's also the separate statutory argument about the AUMF, which as you know is extremely sweeping in its terms, "all necessary and appropriate force."¹¹¹ If you read the AUMF against the history of military tribunals, one of the things you see is that there has never been a Supreme Court ruling against the President in time of war questioning his military tribunal authority going as far back as the trial of Major Andre by George Washington, coming forward to Lincoln's use of these tribunals to that of President Wilson, and so forth.

So, yes, would a specific statute have been helpful? Sure. Would it have been implausible and irresponsible for the office of legal counsel to advise the President that he had statutory authority already? I think not. I think that was especially plausible close to 9/11.

MARCIA COYLE: There's some who say that *Hamdan* makes clear now that the President lacked authority for the Domestic Surveillance Program, and I was wondering—because of the reliance on the AUMF—I was wondering if you see it that way. I see Erwin nodding his head, indicating that he has an opinion. But I was wondering, do you see it that way, and also, actually, it does appear eventually that question will get to the Supreme Court, judging by the litigation around the country right now.

Knowing that the Chief Justice was on the side of presidential power in *Hamdan* in the lower court, sort of reading an inkling into how he views presidential authority in his dissent in the Oregon case, what do you see the fate of the challenge to the NSA Program before the current Supreme Court?

PROFESSOR KMIEC: On the terrorist surveillance program, Judge Anna Diggs Taylor in the Eastern District of Michigan did find it unconstitutional as you report.¹¹² She found it to be a violation of the Fourth Amendment as well as the First Amendment and found it not to be authorized by the authorization and use of military force.¹¹³ The President, of course, I think, will continue to make the argument that the AUMF is broad enough to support that authorization.

111. Authorization for Use of Military Force, 50 U.S.C. § 1541 (Supp. 2002).

112. *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

113. *Id.*

He will also argue the inapplicability of FISA, the Foreign Intelligence Surveillance Act.¹¹⁴ FISA was largely a statute designed to address the problem of domestic security. When Congress got to the issues of war and peace, there were substantial constitutional objections raised by Attorney General Griffin Bell.¹¹⁵

Griffin Bell argued that the President has authority in wartime to conduct military intelligence.¹¹⁶ The way Congress responded was by creating a fifteen-day exception for war.¹¹⁷ Well, no one seriously believes that you can complete a war in fifteen days, at least not the way we're fighting it presently, and given that, what those fifteen days envisioned was another statute. I think the President will continue to argue is that the "other statute" is the authorization for the use of military force—that is assuming Congress does not preempt the whole matter with an even more specific authorization.¹¹⁸

But there's another problem with the case going up to the Sixth Circuit, and that is that the core of this program has not been discussed or disclosed publicly. It is a state secret. The general outlines of the program have been outlined, but whenever Alberto Gonzales or any other member of the administration has discussed this program, they have been very careful to say, "We can't tell you about the operational side," whatever that is—data mining or cross-matching by computers or what. No one can say.

Judge Taylor skirted the state secret issue in an unsatisfactory way. I think the appellate court, looking at the fact that the operational heart of the terrorist surveillance program is not known and is, in fact, guarded as a state secret may well dismiss the case on those grounds. And if that is the case, it's not going to get to the Supreme Court of the United States.

Erwin, I know, disagrees. We should give him time to disagree.

ERWIN CHERMERINSKY: I'll be very brief and try to focus on Marcia's excellent question.

To me this is all about the question: is the President above the law? I think what's consistent about the examples we're talking about here, and others, is that there is a President who is asserting that he can violate the law

114. 50 U.S.C. §§ 1801-1863 (2006).

115. Foreign Intelligence Elec. Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong. Sess. 15 (1978) (testimony of Att'y Gen. Griffin B. Bell).

116. *See id.*

117. *See* 50 U.S.C. § 1801.

118. Subsequent to the symposium, the House, but not the Senate, passed a specific statute authorizing the President's surveillance program. *See* Electronic Surveillance Modernization Act, H.R. 5825, 190th Cong. (2006).

and not be checked by any court. This is an administration with a memo written saying that the President can authorize torture, even though there's a treaty and a statute to the contrary. The President is claiming the authority to detain American citizens apprehended in the United States without having to comply with the Fourth, Fifth and Sixth Amendments.

With regard to the military commissions, the President is claiming that individuals could be detained indefinitely in Guantanamo, even tortured, and there would be no court able to review it. The President is claiming that there is no authority or courts to check warrantless electronic eavesdropping, notwithstanding the Fourth Amendment and the specific statutory provision of the Foreign Intelligence Surveillance Act.

So I think what's omitted from Doug's presentation is the extent to which this administration is claiming unchecked executive power.

Now, that's my transition to Marcia's question. I think there's a very strong parallel to what the Supreme Court did in the *Hamdan* case to what it will be likely to do with regard to electronic eavesdropping. The reason is in *Hamdan*, the Supreme Court said there's statutory and treaty provisions on point.¹¹⁹ The Court said the Uniform Code of Military Justice in Common Article Three of the Geneva accounts were directly on the point and the President was violating these and that was impermissible.¹²⁰ The Court was unwilling to regard the general authorization of the use of military force as enough.

To put this in the context of electronic eavesdropping. There's a constitutional provision on point: the Fourth Amendment requires a warrant for intercepting of conversations except in the very narrow exceptions that aren't present here.¹²¹ Also, the Foreign Intelligence Surveillance Act says all electronic eavesdropping either has to meet the procedures of that statute or another federal statute, Title III, and neither was met.¹²²

So what is the executive claim here as to how it can violate the law? Two things. One is an inherent presidential power; that the President has the authority, just by virtue of being President and Commander in Chief to authorize searches. But I don't think the Court is going to buy that because there's no stopping point. If the President can authorize electronic eavesdropping without a warrant, can he authorize federal law enforcement

119. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2756-57 (2006).

120. *Id.* at 2780.

121. See U.S. CONST. amend. IV.

122. 50 U.S.C. § 1802 (2004).

to go to people's houses without a warrant and search there? If the President's powers can trump the Fourth Amendment, why not the First Amendment? Why can't he even cancel elections required under the Constitution? Where is the stopping point to the President's power?

The other claim the executive makes is the authority to use of military force, but to get to your question, I think *Hamdan* is directly on point because that's where the Court says it's not a blank check. A general authorization for military force doesn't mean the President can do anything the President wants like creating military tribunals or authorizing electronic eavesdropping that violates the Constitution or federal statutes.

PROFESSOR KMIEC: Of course, Justice O'Connor, in her plurality opinion in *Hamdi* said the authorization for the use of military force includes the necessary incidents of war which she described as the capture, detention, and trial of enemy combatants.¹²³ So there are some things that are read into the general force authorization by the Court itself.

AUDIENCE QUESTIONS FACILITATED BY PROFESSOR PUSHAW

PROFESSOR PUSHAW: The audience members I'm afraid share Professor Chemerinsky's skepticism. A couple questions. I'm just reporting here. Here's one: You seem overly sympathetic to President Bush having a blank check returned. Have there been any recent cases where you feel President Bush is trying to play monarch, or do you feel that he has included all pertinent voices and the checks and balances required?

Here's another: Isn't the military tribunal system intended to permit the U.S. to indefinitely detain individuals suspected of terrorist intent, but in the absence of sufficient evidence of either overt acts in support of terrorism or a conspiracy to commit terrorism—in short, detain virtually anyone at the wisdom and discretion of government?

Another audience member said that you've justified President Bush's establishment of military tribunals that take jurisdiction away from the judicial system by saying, "The President is motivated to have a legal system," but the President is not in charge of the legal system. He is limited to the executive system; so doesn't your argument demonstrate his lack of authority for military tribunals?

PROFESSOR KMIEC: Those are all good questions or comments. On occasion, I have been troubled by the unnecessary and hypothetical scope of some of the legal analysis that the President has been given, especially on

123. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

the matter of interrogation practices. I think that started things off on a bad foot. On the other hand, I also think it's important for those of us who criticize in 2006 to remember the circumstances and uncertainties in 2001.

With regard to putting himself above the law, I don't think the President has that desire, and I think, for example, the most recent condemnation by the ABA of the President's use of signing statements was most unfortunate and most imprudent. The ABA's resolution was challenged in its wisdom by our friend Laurence Tribe, who was with us for the last conference and also challenged by Walter Dellinger, and by the leadership of the office of legal counsel in the Clinton administration, and for this simple reason: the President has an obligation to take care that the laws are faithfully executed and the laws include the Constitution of the United States. I think it was Walter Dellinger who wrote in the *New York Times* that if Congress enacted as part of an omnibus bill that the ABA President should be arrested and detained indefinitely, he might want the President to note in the signing statement that he doesn't intend to enforce that provision.¹²⁴

124. Walter Dellinger, *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17.

